BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER G. YARBRO Claimant	)	
VS.	)	
FIRST AMERICA Respondent	)	Docket No. **1,056,623**
AND	)	
NEW HAMPSHIRE INSURANCE Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 21, 2011 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment with respondent and the accidental injury was the prevailing factor causing his injuries. The ALJ ordered claimant's medical treatment with Dr. Michael Smith to be paid by respondent.

Respondent requests review of whether claimant sustained a personal injury arising out of and in the course of his employment with respondent and whether claimant's accident was the prevailing factor in causing his medical condition and any resulting impairment or disability.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Roger Yarbro began working as a bus driver for respondent in August 2001. His routes were the morning, midday and afternoon which was about 7.5 hours per day, 5 days a week. Claimant would also get overtime hours if he drove for activity trips in addition to his normal work day schedule. He was paid $12.35 an hour or approximately $500 a week.

On Monday, May 16, 2011, claimant was driving a bus and had stopped at a stop light. The bus was rear ended by a drunk driver's vehicle that was going approximately 50 miles an hour. The impact knocked the bus forward 12 feet. The bus' frame was bent and it was taken out of service. Claimant testified:

> At the point of impact it was just like a big light went off, you know, boom. And when I tried to get out, I could not stand up. I had no balance, you know.
>
> Q. What part of your body did you feel symptoms in immediately, if any?
>
> A. Immediately in my lower back and my neck.[1]

Claimant initially refused medical treatment and later drove the bus back to the lot even though the bus was totaled. But as his back and neck pain did not improve, on Friday, May 20, 2011, respondent's manager or safety manager told claimant to seek medical treatment at Lawrence Memorial Hospital's emergency room. Claimant was having severe neck pain, tingling with numbness in his left arm and also a headache. X-rays were taken of claimant's back and also a CT scan of his neck. Both tests did not show any abnormality. The doctor prescribed some medication for pain and referred claimant to Dr. Chris Fevurly.

On Monday, May 23, 2011, claimant was examined and evaluated by Dr. Fevurly. Sixteen sessions of physical therapy were ordered for claimant's back and neck. But the physical therapy did provide any benefit. On June 21, 2011, Dr. Fevurly noted claimant had not made any progress in five weeks of conservative treatment. Dr. Fevurly recommended an MRI and epidural injections for claimant's cervical and lumbar spine but the recommended treatment was not approved by respondent.

Claimant then retained counsel and filed this claim, whereupon respondent referred claimant to see Dr. Michael Smith on July 29, 2011. Claimant complained of lower back pain radiating into the left buttocks and left posterior thigh. Claimant also complained of neck pain with numbness and weakness in the left arm. Dr. Smith recommended an MRI of claimant's cervical, thoracic and lumbar spine. In Dr. Smith's notes he opined that the motor vehicle accident was the prevailing factor in claimant's current complaints. The report provided in pertinent part:

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[1] P.H. Trans. at 10.

> I am in receipt of a letter from Jean Hoffmann. Mr. Yarbro is asking whether I think the motor vehicle accident is the prevailing factor in his current complaint. At this juncture, I think that it is. Without any further studies, it's hard to know exactly what's going on, but his complaints seems to have begun after the motor vehicle accident.[2]

On August 11, 2001, an MRI of the cervical spine showed "evidence of a mild grade 1 reverse spondylolisthesis of C5 and C6 with diffuse degenerative changes and associated bulging of the disk complexes with central spinal canal and neural foraminal narrowing noted at multiple levels . . . These findings are most pronounced at the C5-6 level where there is severe central spinal canal narrowing and apparent compression of the cord with prominence of the central spinal canal noted as described."[3]

Claimant returned to see Dr. Smith on August 19, 2011, for a follow-up to discuss his MRI results. X-rays of claimant's cervical spine were taken. The radiographs showed a fair amount of degeneration in the cervical spine at C4-5 and C5-6. The doctor diagnosed claimant with fairly significant cervical stenosis at C5-6 and recommended that claimant undergo a cervical decompression and fusion at C4-5, C5-6 and C6-7.

Claimant discussed the surgical option with Dr. Smith and asked what would happen if he declined the recommended surgery. Claimant testified that Dr. Smith told him that if he did not have the surgery he could end up paralyzed.[4]

At the time of the preliminary hearing, claimant was still having back and neck pain as well as headaches. Claimant testified that he had not seen a doctor nor had any symptoms regarding his neck before the accident on May 16, 2011. Claimant is performing light-duty work and only working 4 hours a day for respondent.

The ALJ analyzed the evidence in the following pertinent fashion:

> Claimant's accident was the prevailing factor causing the injury. Claimant was involved in a serious motor vehicle accident caused by a drunk driver while driving a bus owned by his employer. There was no evidence of prior recommendation for surgery. Dr. Smith opined the risk of paralysis without surgery. There was no indication of a risk of paralysis prior to claimant's accidental injury. Claimant is 70 years old with no evidence of a pre-existing condition requiring medical care.

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[2] P. H. Trans., Cl. Ex. 2.

[3] P.H. Trans., Cl. Ex. 2.

[4] P.H. Trans. at 20.

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (f) (1*)* "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include: (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living; (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character; (iii) accident or injury which arose out of a risk personal to the worker; or (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent argues claimant failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment or that the accident caused his medical condition. Respondent argues that the accident merely rendered claimant's preexisting condition symptomatic. Respondent's argument that claimant had a preexisting condition is based upon the diagnostic tests which revealed claimant had degenerative disc disease.

The difficulty with respondent's argument is the fact that the only medical opinion offered in this case indicates that the accident was the prevailing factor with the claimant's current complaints. And although the medical records and diagnostic tests indicated that, not surprisingly, this 70-year-old claimant had degenerative disc disease, again, the sole medical opinion provided by Dr. Smith indicates that there was a potential for paralysis without surgery.

As noted by the ALJ, claimant had no history of cervical complaints before the accident. After the accident the evidence indicates claimant now has impingement causing numbness and weakness in his arm. That is a change in his physical structure causing harm. Upon consideration of all the relevant evidence submitted by the parties, this Board Member finds the claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and the accident is the prevailing factor causing the injury, medical condition and disability. Consequently, the ALJ's Order for Medical Treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 21, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[5] K.S.A. 44-534a.

[6] K.S.A. 2010 Supp. 44-555c(k).